

**Before the  
STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

In the Matter of	)	
	)	
Verizon Communications Inc. and	)	DT 05-042
MCI, Inc. Agreement and Plan of Merger	)	
	)	

**OFFICE OF CONSUMER ADVOCATE  
POST-HEARING BRIEF**

The Office of Consumer Advocate submits it's Post-Hearing Brief on the proposed merger of Verizon Communications Inc ("Verizon") and MCI, Inc. ("MCI") based upon its review of the initial Notice of Acquisition, as amended ("Notice"), the Detailed Description of Impact ("Description of Impact") and its attendance at the Hearing held on June 17, 2005.

**I. Commission's Jurisdiction and Standard of Review**

RSA 374:30 requires Commission approval and a finding of public good for the "transfer or lease [of] its franchise, works or system, or any part of such franchise, works or system, exercised or located in this state..." by "any public utility." Both Verizon and MCI have subsidiaries providing switched local services and toll services to consumers in New Hampshire. As a result, it follows that each have "franchise, works or system" located in New Hampshire. Further, by virtue of supplying these services they are each operating as a public utility in New Hampshire. This Commission has applied its merger review authority to out of state holding companies. See Re Contel of New Hampshire, Inc., 79 N.H. P.U.C. 226, 228 (1994). In this case the Commission should exercise its jurisdiction to review the proposed Verizon MCI merger.

This Verizon-MCI merger is not exempted from review by RSA 374:22-o which states:

“Any person or business entity authorized by the commission to engage in business as a competitive local exchange carrier and any competitive toll provider having less than a 10 percent share of toll revenue in New Hampshire shall not be required to seek prior commission approval of financings or corporate organizational changes, including, without limitation, mergers, acquisition, corporate restructurings, issuance or transfer of securities, or the sale, lease, or other transfer of assets or control....”

MCI has 18.2% of the 2004 New Hampshire intrastate toll revenue and Verizon and its affiliates have 40.8%. See Attachment and Transcript June 17, 2005 at 8-9.

RSA 369:8, II (b) (3) provides for the Commission to make a determination following a public hearing on the utility’s detailed representation in writing.

“If the commission within 30 days, and after an opportunity for a public hearing, issues a preliminary written determination that such a merger or acquisition will have an adverse effect on rates, terms, service, or operation of the public utility in the state, the commission shall allow the utility at least 30 days to amend its filing in order to address the commission’s preliminary determination.” RSA 369:8, II (b) (3)

Finally, the Commission may find an adverse effect and then proceed to review the proposed transaction under the standard provided in the original statute, in this case RSA 374:30.

“Should the commission find within 30 days after receiving the amended filing, the proposed merger or acquisition has an adverse effect, the commission shall review the transaction under the statute which would have otherwise applied but for this section, and, after an opportunity for a public hearing, issue a ruling based upon the other applicable statute or statutes within 60 days of its determination of adverse effect.” RSA 369:8, II (b) (5)

The statutory language of RSA 369:8 requiring a Commission determination after a hearing implies an examination of the evidence presented by the merging applicant as well as others. The standard for this preliminary finding, since it is not specified should be read to mean that the Commission should find, based upon a preponderance of the evidence, that the “transaction will not have an adverse effect on rates, terms, service, or operation of the public utility within the state.” RSA 369:8, II. See NH Code of Admin. Rules Jus 812.03 (Burden of proof in proceedings before state agencies are a preponderance of the evidence.); See also NH

Code of Admin. Rules Jus 801.02(b) (Justice Rules apply to adjudicative proceedings conducted by an agency that has adopted procedural rules to the extent that the agency's rules do not address a practice or procedure addressed by the model rules.)).

In this case, as discussed below, the Commission should find that the transaction will have an adverse effect and require Verizon and MCI to file an amended detailed representation which includes agreement to the conditions recommended in the OCA comments as modified below.

## **II. Basis for a Commission Determination of Adverse Impact**

By transferring ownership of MCI to a subsidiary of Verizon this transaction eliminates an independent competitive provider of local exchange service as well as in-state and out-of-state toll service. Further, as evidenced by the Attachment, following this merger Verizon and MCI will have 59% of the New Hampshire intrastate toll revenues. In addition, Verizon, even without MCI, already controls more than 80% of the switched access lines in its New Hampshire service territory. The combined Verizon-MCI entity will have a huge share of the bundled local and long distance landline telephone market in New Hampshire. Notwithstanding this loss of a significant competitive provider, Verizon claims that the merger will not adversely impact consumers or the competitive market. See Transcript June 17, 2005 at 43. At hearing the Verizon witness admitted that Verizon has not done an analysis of whether any cost increases will be passed along to New Hampshire customers. Transcript June 17, 2005 at 107.

OCA does not accept that the loss of a competitor, even one which is apparently losing market share of residential customers, will have no adverse impact. The loss of any competitive party is an adverse impact in a developing competitive market. Verizon acknowledged at

hearing that the less competition exists the less restraint there is on raising prices. See Transcript June 17, 2005 at 44.

Although Verizon referenced synergies savings estimates in other filings, Verizon and MCI will not agree to pass any of those savings along to customers. Transcript June 17, 2005 at 107. Instead, Verizon indicated that any savings experienced by customers would be strictly as a result of the competitive markets. Further, Verizon would not commit that any acquisition premium paid for MCI would not be passed through as an additional cost to Verizon customers. Transcript June 17, 2005 at 109 and 195. Finally, Verizon would not commit to any rate stability following a merger. Transcript June 17, 2005 at 105.

Verizon acknowledged that quality of service standards were part of the conditions the Commission placed on the predecessor telephone company in the Nynex-Bell Atlantic merger. Transcript June 17, 2005 at 156, however, Verizon claimed that going forward only the competitive markets would control service quality and that no metrics should be developed to measure that service quality. Transcript June 17, 2005 at 156-157. Verizon also acknowledged that following the Nynex merger in 1999, service quality standards as measured by the Commission dropped between 2000 and 2004. Transcript June 17, 2005 at 160-162.

## **II Modified Conditions Based Upon the Hearing Record**

Theoretically a truly competitive market competes for customers through price, service, etc. Local basic telephone service is a market, which especially in a largely rural state like New Hampshire, is not a service which can be called truly competitive statewide. As a result, the loss

of a major competitor can do nothing but set back the goals and gains from competition in New Hampshire.

### **1. Conditions to promote competition**

a. A standard anti-trust and regulatory response to anti-competitive combinations like this one is to open duplicative facilities to competition. As a condition of merger, Verizon and MCI should be required to divest themselves of duplicative long-distance and Internet backbone capacity.

b. Recently, RBOCs (including Verizon) have been involved in efforts to restrict municipalities and other governmental entities from investing in broadband networks, such as Wi-Fi and Wi-Max that will be made available to consumers.<sup>1</sup> A combined Verizon/MCI will have even more incentive and ability to participate in these anti-competitive efforts.<sup>2</sup> As a condition of their merger, the Applicants should be required to commit not to participate in such efforts.

### **2. Conditions to Ensure Consumer Benefits**

Verizon should commit to maintaining and promoting Lifeline and Linkup plans that provide benefits to eligible consumers throughout its territory.

### **3. Conditions to Guarantee Consumers are not Harmed**

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<sup>1</sup> “Wi-Fi plan to face static,” The Business Journal (Minneapolis/St. Paul), April 25, 2005 at <http://twincities.bizjournals.com/twincities/stories/2005/04/25/story1.html?t=printable>; “Verizon CEO sounds off on Wi-Fi, customer gripes,” San Francisco Chronicle, April 16, 2005 at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2005/04/16/BUGJ1C9R091.DTL&type=business>; “Is Low-Cost Wi-Fi Un-American?”, In These Times, April 18, 2005 at <http://www.inthesetimes.com/site/main/article/2071/>.

<sup>2</sup> In addition to increasing the incentives and ability of the larger merged entity to discriminate against rivals by raising entry barriers that will adversely affect the ability of rivals to compete, an important public interest detriment to the merger is the loss of diversity in positions. MCI has been one of the few with resources to stand in opposition to Verizon on issues of policy. Now Verizon is “buying out” its main competitor in the economic marketplace as well as in the political and regulatory arena.

a. Verizon is not currently meeting minimum quality of service standards for its local telephone service in New Hampshire. The proposed merger does not provide any additional incentive to meet these minimum standards and may even reduce service quality by removing a competitor who might otherwise provide consumers with an alternative to the Verizon NH service offerings.

In DR 96-220, Order 22484 dated January 20, 1997 relating to a proposed merger of Bell Atlantic and NYNEX the Commission approved the merger contingent upon the post-merger carrier complying with quality of service standards as promulgated by NARUC. Re New England Telephone and Telegraph Company dba NYNEX, 82 N.H. P.U.C. 30, 34 (1997). What the Commission did not adopt, however, were Staff witness Bailey's recommendations of "an automatic refund system by which the merged company would refund certain amounts of customers' basic exchange charges in the event service fell below the standards for a specified number of months." Id. at 33.

Recognizing that the merger was completed June 30, 2000, staff Attorney Fabrizio introduced Exhibit 17 at hearing. Exhibit 17 showed Verizon and its predecessors' quality of service performance from 1996 until 2004. Exhibit 17 showed significant degradation in various service quality measures from 2000 to 2004. Transcript June 17, 2005 at 159. Based upon this evidence the Commission should not repeat its former approach to service quality issues, and instead should adopt an automatic refund system as proposed in the prior docket by Ms. Bailey.

The refunds could be as simple as:

1) A held order over 30 days results in a daily credit equal to ten times what would have been the daily rate charged the customer.

2) Out of service for more than 24 hours results in a credit of \$25, and an additional \$25 for each additional 24 hour period, absent extremely extenuating circumstances.

3) If a repair person doesn't show up within 1 hour of the scheduled time, a \$25 credit will be applied for each hour late. Again, absent extremely extenuating circumstances.

b. Verizon is currently a utility regulated under a traditional rate of return model in New Hampshire. In numerous prior merger dockets a merger issue was the acquisition premium. Questions about such were revisited in this proceeding by the OCA and Staff, as well as the Commission, without any commitment by Verizon not to seek to recover such cost from regulated customers in the future. In fact, Verizon admitted that any cost savings will be passed on through competitive prices and not to traditional regulated services. Transcript June 17, 2005 at 107.

As a result, the Commission must protect customer services which are not currently truly competitive from the potential adverse impacts of this merger. This could be accomplished by conditioning the merger to the extent that:

- 1) Capping regulated residential rates at current levels in New Hampshire;
- 2) Clarifying that while under traditional rate of return regulation, rates shall not include an acquisition premium;
- 3) In order to counter the blow to competition in the intrastate toll market (Verizon is combining with its largest competitor), Verizon should reduce intrastate access charges to the level of interstate charges without raising any other rates. This might bring other competitors into this market where a bigger, stronger Verizon will have more than 50% of the market.

## CONCLUSION

The merger of Verizon and MCI will harm competition. The combined Verizon/MCI entity will be able to raise substantial obstacles to other competitors in New Hampshire. This merger will combine the largest and the fourth largest telecommunications firms in terms of total US revenues.<sup>3</sup> Further, this merger must be reviewed in context with the proposed SBC/AT&T merger, which will combine the second and third largest firms.<sup>4</sup> The combinations will leave the next-largest firm with less than one-fourth the revenues of the smallest of the two industry giants.

As currently structured, the merger should not be approved. If the Commission adopts substantial enforceable conditions such as those outlined above, the public interest harms will be sufficiently limited and the public interest benefits will be adequately increased so as to make approval of this merger proper under the law.

Respectfully submitted,

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Date

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<sup>3</sup> FCC Statistics of Common Carriers, 2003-2004, Tables 1.1 and 1.2.

<sup>4</sup> *Id.*